U.S. Depariment of Labor

MEMORANDUM TO:

Office ot Administrative Law juages 800 K Street, **N.W.**
Washington, D.C 20001-8002

October **24,** 1995

Robert B. Reich
Secretary **of Labor**

FROM: Nicodemo De Gregorio
Administrative Law Ju

SUBJECT: Henry Immanuel **v.** Wyoming Concrete Industries, Inc.
Case **No.: 95-WPC-0003**

Pursuant to 29 C.F.R. **24.6** I am transmitting herewith my Recommended Decision and order in the above-captioned case, together with the record of the proceedings. The Recommended Decision and order has been served upon the parties.

U.S. Department of Labor Office of Administrative **Law** Judges
800 K Street, N.W.
Washington. D.C. 20001-8002

In the Matter of

HENRY IMMANUEL,
Complainant

V . I
I
I

WYOMING CONCRETE i

INDUSTRIES, INC., i

Respondent I

i
I

DATE ISSUED: October **24,** 1995

CASE NO.: 95-WPC-3

Richard **E.** Condit, Esq.
Mick G. Harrison, Esq.
For the Complainant

James J. Sullivan, Esq.
Kathryn **A.** Kelly, Esq.
For the Respondent

Before: Nicodemo De Gregorio Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Water Pollution Control Act (WPCA), 33 U.S.C. § 1367, and the regulations promulgated thereunder, 29 CFR Part 24. Henry Immanuel (Complainant) alleges that he was discharged by his employer Wyoming Concrete Industries, Inc. (Respondent) in retaliation for environmental concerns he had raised about his employer. A hearing was held in Baltimore, Maryland on May 2, 1995 where both parties appeared with respective counsel. Subsequently, both parties filed briefs, which I have found very helpful.

1- Statement of the Case.

Respondent Wyoming Concrete Industries manufactures and sells
concrete blocks ready mix concrete, precast architectural products, and certain highway structures such as median barriers. Tr. at 265. It owns five facilities, three in Delaware and two in Maryland. The president of Respondent is William DiMondi, whose responsibilities in the summer of 1993 included overseeing the personnel and sales departments. Tr. at 264-65.

On June 8, 1993 Complainant Henry Immanuel applied for a position as ready mix concrete truck driver at Respondent's facility in Blades, Delaware. Complainant filled out a

a Driver Application for Employment in the presence of the facility's manager, Frank Fluharty, stating that the application was not 100 percent accurate. Mr. Fluharty replied that accuracy of the application was no big deal; his primary interest was to find out if Complainant had a commercial driver's license and could drive. Tr. at 57, 60. After passing a driving test and a medical examination, Complainant was hired effective the following Monday, June 14, 1993. His basic task was to deliver concrete from the plant to a customer's job site. Tr. at 61. In accordance with company personnel policy in effect at that time, Complainant's employment was subject to successful completion of a probationary period of 60 days, Tr. at 279; CX 7 at 3; JX I.

Apparently from the start, Complainant began to notice what he considered to be shortcomings in the work practices and the working conditions at the Blades facility. He was concerned about the use of acid in cleaning trucks, the spillage of motor oil on the ground, the storage of used engine oil in open barrels, and brought these concerns to the attention of Mr. Fluharty. Tr. at 64-79. But it was a company picnic for the company employees and their families that gave Complainant the opportunity to express all his grievances to the other employees.

Sometime before July 16, 1993 all employees and their immediate families were invited to attend a company picnic to be held in a state park in the afternoon of July 25, 1993. CX 1. Complainant came to the picnic with his family, and distributed to other employees about 20 to 25 copies of a letter addressed to "Dear Fellow Workers". The letter listed seven categories of "shortcomings" which Complainant had observed at the Blades plant. First on the list are the environmental problems:

Environmental Problems- oil in drums exposed to rain has spilled onto the ground; the cement acid that is used on trucks to clean them goes directly onto the ground (does anybody believe that this stuff works?) What would the EPA say about this pollution? JX 3.

The remaining complaints relate to 1) the safety of trucks; 2) the safety of the loader at the plant; 3) the noise generated by the trucks; 4) low wages; 5) the lack of health benefits; and 6) unprofessional treatment. JX 3. The letter ends with an appeal to unionize, and recommends the Teamsters Union, Local 35S. Mr. DiMondi received a copy of the letter from another employee in the early afternoon.

At the end of the picnic, just as Complainant was about to drive home with his family, Mr. DiMondi approached the car with a copy of the letter in his hand, and an altercation ensued. According to

Complainant, Mr. DiMondi waived the paper in his

hand and asked what it was about. Complainant replied, read it--. There were more questions and answers. Then Mr. DiMondi told Complainant he was fired. Complainant observed that it was illegal to fire him for exercising his rights, whereupon Mr. DiMondi rehired him and told him to report for work at 7:00 a.m. the next morning. During this exchange, Mr. DiMondi appeared to be in a rage. Tr. at 87-91. Complainant's version of the encounter is corroborated by the testimony of his wife and their young daughter Amunah, who were in the car with Complainant and were intimidated by Mr. DiMondils demeanor. Tr. at 241, 228.

Mr. DiMondi remembers the incident differently. He testified that he received a copy of the letter at about 2:00 p.m. but waited until the end of the festivities to approach Complainant to express his disappointment that Complainant had chosen the company picnic to "run down" management without first discussing the concerns with management. Mr. DiMondi denied firing Complainant on the spot. According to him, when Complainant stated that he could not be fired because he had distributed the leaflet, Mr. DiMondi replied that he could fire him. Mr. DiMondi also denied that he acted in such a way as to give the impression that he wanted to strike Complainant. Tr. at 381-84.

It is not necessary to resolve the discrepancy in the testimony as to whether Complainant was fired at the picnic. The relevance of the incident to this case consists in this, that the letter was distributed to the other employees of Respondent; that a copy of the letter found its way into Mr. DiMondi's hands; and that Mr. DiMondi, reacted with anger.

On July 30, 1993, the Friday next following the picnic, Complainant attended a meeting with Messrs. DiMondi and Fluharty. First, Complainant was invited to discuss his grievances. Then, Mr. Fluharty reviewed a Performance Evaluation/Status Determination form, which rates Complainant with respect to 15 personal traits and work performance and concludes that he should not be converted to regular status. RX 8. DiMondi concluded the meeting by informing Complainant that he was terminated. Mr. DiMondi gave six reasons for the decision to discharge Complainant, including three customer complaints regarding his attitude and handling of equipment; misrepresentations on the employment application; and inability to work a full shift.

2- Statement of the Apt)licable Law .

Section 507(a) of the Water Pollution Control Act provides as follows:

No person shall fire, or in any other way discriminate against... any employee... by reason of the fact that

such employee... has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter. 33 U.S.C. §1367(a).

Section 507(b) of the Act provides that any employee who believes that he has been fired or otherwise discriminated against by any person in violation of the Act may, within 30 days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or discrimination. "A copy of the application shall be sent to such person who shall be the respondent." 33 U.S.C. §1367(b).

In order to establish a case of retaliatory discharge under the Act Complainant must establish that (1) he was an employee of Respondent; (2) he engaged in an activity protected by the Act; (3) Respondent took adverse action against him; and that (4) the adverse action was taken because he participated in the protected activity. Passaic Valley Sewerage ComIrs v. Dept. of Labor, 992 F.2d 474, 480 (3rd Cir. 1993); Carson v. Tyler Pipe Co., Case No. 93-WPC-11, Sec. Dec., March 24, 1995, slip op. at 5-6; Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 199S, slip op. at 8-12. Of course, Complainant must have filed a timely complaint.

3- Statement of the issues.

The primary issues in this case are (1) whether the complaint
that gave rise to this proceeding was timely filed, or, more precisely, whether the 30-day statute of limitations should be tolled; (2) whether Complainant's distribution of the leaflet at the company picnic was activity protected by the Act; and (3) whether Complainant was discharged because of his participation in that protected activity.

4- Timeliness of the Complaint.

Within a week of his discharge, Complainant sought help from
the Environmental Protection Agency, and was advised to contact the Occupational Safety and Health Administration (OSHA), the National Labor Relations Board (NLRB), and the Delaware's Division of Natural Resources and Environmental Control (DNREC). Tr. at 104, 107. Accordingly, Complainant addressed a letter dated August 4, 1993 to DNREC; filed a complaint with NLRB on August 12, 1993; and filed a complaint with OSHA by telephone on August 27, 1993. JX 6; RX 1; CX 2. One year later, by letter dated September 16, 1994, Complainant filed with the Wage and Hour Division, Department of Labor the complaint

which initiated the instant proceeding. JX 4.

Section 24.3 of Title 29, Code of Federal Regulations
relates to the form of a complaint under the Act and the time and place where the complaint may be filed. The regulation provides that any employee who believes that he has been discriminated against by an employer in violation of the Act may file a complaint alleging such violation. The complaint must be filed with the Wage and Hour Division within 30 days after the occurrence of the alleged violation. No particular form is required, except that the complaint must be in writing and should include a full statement of the acts and omissions which are believed to constitute the violation.

Obviously, the complaint dated September 16, 1994 was filed in the proper forum but not on time. Complainant's contention, however, is that this case comes within the doctrine of equitable tolling as enunciated in School Dist. of City of Allentown v. Marshall., 657 F.2d 16 (3rd Cir. 1981). In that case the court identified three situations **where** tolling a statute of limitations is appropriate:

(1) the defendant has actively misled the plaintiff respecting the cause of action;
(2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or
(3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. 6S7 F.2d at 20.

The court added that the filing of a claim in the wrong forum must also be timely before it will toll the appropriate limitations period. Ibid. The court also stated that the restrictions on equitable tolling must be scrupulously observed. 657 F.2d at 19.

Complainant argues that the filing of the complaints with DNREC and OSHA during August 1993 meets the wrong forum test of the equitable tolling doctrine. Complainant's Post-Hearing Brief at 21. I cannot agree.

On August 4, 1993 Complainant wrote a letter to DNREC. The letter simply states that Complainant distributed a letter, a copy of which was enclosed, on July 25, 1993, and was terminated from the job on July 30, 1993; points out that the first item on the list of complaints pertains to environmental problems at the Blades plant; and concludes that a major problem would be at the drum cleanout area after cement delivery. JX 6. The letterldoes not allege a violation of the employee protection provisions of any statute, state or federal, and does not seek any relief. It has the appearance of a citizen's report of a possible law violation and suggests that an investigation of the environmental problems at the Blades plant would be appropriate. The letter does not indicate that a copy was sent to Respondent.

On August 27, 1993 Complainant filed a complaint with the Philadelphia office of the Occupational Safety and Health Administration by telephone. Complainant stated that he had worked for Respondent as a cement mixer driver; that he had advised the plant manager of environmental, wage, and safety problems at the work site; that he had distributed a leaflet to employees accusing Respondent of ignoring environmental problems, transportation violations, unsafe trucks, low wages, and lack of health benefits, and suggesting the need to form a union to address the problems; and that he had been terminated on July 25, 1993, rehired, and terminated again on July 30, 1993 for poor work performance. CX 2. It is clear that the complaint was understood by OSHA investigators as alleging a

retaliatory termination for having complained of safety conditions at the work place, and that Complainant knowing this interpretation of his complaint did not protest. OSHA investigators Ronald F. Tate and William D. Seguin conducted a personal interview of Complainant on September 28, 1993. During the interview Complainant was asked why he felt Respondent had terminated him, and he replied that it was due to his attempt to unionize the work place. On being advised that such activities were handled by NLRB, Complainant stated that he had already filed with NLRB, Wage and Hour, and EPA. He was specifically notified that OSHA would not address the issue of termination for union activities, and that its sole objective was to determine if there was evidence that his discharge was the result of safety complaints. Finally, the investigators advised Complainant that it was unlikely that they could establish an OSHA violation as he himself felt that the reason had to do with union activities. Complainant agreed, and requested that the complaint be withdrawn. RX 6.

In sum, within 30 days of his discharge Complainant contacted several agencies and gave them an account of what had happened. But these stories are not complaints raising the "precise statutory claim" that section 507 of WPCA had been violated, even though a lawyer may see in them the basis for filing a complaint. Respondent was entitled to notice within 30 days from July 30, 1993, that it had been charged with violating section 507 of the WPCA. The regulations may be read as relieving Complainant of the statutory duty to notify the person charged with discrimination, and as devolving upon the Administrator of the Wage and Hour Division the duty to do so "upon receipt" of a timely complaint. 29 CFR §24.4(a). Respondent in this case did not receive a timely notice either way. Part of the rationale for

tolling a limitations period when a claim has been filed in the wrong forum is that the respondent has been put on notice within the appropriate limitations period. School Dist. of City of Allentown v. Marshall, 657 F.2d 16, 20 (3rd Cir. 1981). I note that in that case, wnich arose under analogous provisions of another statute, the Secretary had tolled the filing period on the grounds, among others, that the complainant had written to EPA within 30 days of the alleged violation, narrating his experiences. The court stated that this point was not defended on appeal, and that in any event it would hold that the letter did not constitute a complaint. 657 F.2d at 19.

Accordingly, I conclude that the complaint in this case must be dismissed because it is time-barred. Although this timeliness issue is dispositive of the case, I shall consider the other two issues briefly.

5- Protected Activity.

Complainant contends that his distribution of the leaflet at the company picnic on July 25, 1993 was an activity protected by the WPCA. I agree.

At first sight, the text of the Act, quoted above, suggests that its purpose is to protect employees who either initiate or testify at a proceeding under the Act. The regulations extend the protection to employees who assist or participate 11 ... in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute". 29 CFR §24.2(b)(3). The Secretary has consistently held that internal complaints are protected activities.

Carson v. Tyler Pipe Co., Case No. 93-WCP11, Sec. Dec., March 24, 1995, slip op. at 6. This interpretation of the statute has been endorsed by various courts, including the Third Circuit. See Passaic Valley Sewerage ComIrs v. Deipt. of Labor, 992 F.2d 474, 478-80(3rd Cir. 1993).

The instant case differs from the common situation in this respect, that the complaint was not made directly to a manager or. supervisor. But, given the broad remedial purpose of the statute, there is no apparent justification for a construction of the statute that would permit an employer to retaliate against an employee who discloses possible violations of the statutelsolely because the president of the company learns of the disclosure indirectly, through another employee. See Carter v. Electrical District No.2 of Pinal County, Case No. 92-TSC-11, Sec. Dec., July 26, 1995, slip. op. at 21 (contact with the press protected activity). Finally, contrary to Respondent's contention, the fact that Complainant's motive in drafting and distributing the

leaflet was to organize a union does not take him out of the statute's protection, so long as his environmental concerns were grounded in conditions constituting reasonably perceived violations of the statute. Id at 18.

Accordingly, I conclude that Complainant's distribution of
the leaflet at the picnic was protected activity under the WPCA.

6- The Discharge.

I believe that Complainant has failed to carry his burden of proving by a preponderance of the evidence that his discharge was a reprisal for his protected activity. On the contrary, I believe that Respondent has proved that the discharge-was motivated by legitimate, work-related reasons.

Complainant is certainly correct in asserting that unlawful motive may be proved by circumstantial evidence. It is not common to find direct evidence of an intention to violate the law. I also agree that ordinarily proximity in time between a decisionmaker's awareness of an employee's protected activity and adverse personnel action against the employee is sufficient, standing alone, to raise and inference of causation. See, e.g., Carson v. Tyler Pine Co., supra, at 9. But this is not an ordinary case, because here the protected activity, disclosure of environmental problems, was intermingled with disclosure of other concerns that have nothing to do with the WPCA.

Complainant's purpose in distributing the leaflet was to urge Respondent's employees to join the Teamsters Union. Before the picnic, Complainant had discussed his intentions with a vice president of Teamsters Local 355, and had got union cards which he did not distribute, having decided instead to address a letter to the employees who would gather at the picnic. RX 2 (Complainant's affidavit to NLRB at 2-3). More significantly, this purpose is expressed in the letter. Thus, the more natural inference to be drawn from the distribution of the letter, the angry reaction of Mr. DiMondi, and the termination of employment five days later, considered by themselves, would be that the discharge was due to the organizational activity. And this is the interpretation that Complainant put on the events and stated to the NLRB and OSHA. RX 1, 3, 6.

At any rate, Respondent has adduced ample evidence that Complainant's employment was terminated for legitimate business reasons, primarily on account of customer complaints with regard to his work performance and conduct. The decision to terminate Complainant was made by Mr. DiMondi about ten days before the

picnic, and was announced to Respondent's managers at a supervisors' meeting held on July 21, 1993, as shown by the minutes of that meeting. Tr. at 3SS, 3S7, 361-62; RX 18. The incidents that gave rise to the complaints are well documented.

On July 7, 1993, Complainant was the second driver to deliver ready mix concrete to a customer, Mr. John Mahetta, for the purpose of pouring a foundation for a house. Complainant was unable to positioned the truck in accordance with Mr. Mahettals instructions, with the result that the previous driver had to use an extension chute in order to make the delivery. Moreover, Complainant refused to assist in moving the chute, on the ground that it was not his joh. According to Complainant's testimony, Mr. Mahetta was "furious". Tr. at 544. Complainant's supervisor, Mr. Fluharty was also mad about the incident. RX 2 at 14. Mr. Mahetta told Mr. DiMondi he did not want Complainant to deliver concrete to his jobs again. Tr. at 436.

There were two additional delivery incidents that resulted in customer complaints. On July 13, 1993, Complainant again was the second truck driver to arrive at a construction job located in Preston, Maryland. He discharged a large amount of concrete at an improper degree of liquidity, with the result that another driver and two customers had to shovel the concrete around the foundation. The delivery was observed by Mr. Greg English, the manager of another plant of Respondent located in Maryland. Mr. English was concerned about this problem because the customer was fairly new, and reported the incident to Mr. Fluharty in the hope of avoiding a repetition. Tr. at 494-96. The other incident occurred on July 22, 1993, when Complainant covered the customer with concrete. Tr. 435-36. Again, the customer was angry and complained to Complainant's supervisor.

Complainant argues that Respondent's failure to call Mr. Fluharty and other members of the management as witnesses not only undermines the credibility of its justification for Complainant's discharge, but requires an inference to be drawn that those employees, if called to testify, would have given testimony unfavorable to Respondent. I think it is enough to point out that the testimony concerning the three delivery incidents and the consequent customer complaints is sufficiently corroborated by a sworn affidavit which Complainant gave to NLRB on October 1, 1993, when his memory was fresh. See RX 2. This affidavit also corroborates that on four occasions Complainant became tired and was unable to continue working without a substantial break, another reason why Mr. Fluharty was dissatisfied with Complainant's performance. RX 2 at 10.

SERVICE SHEET

Case Name: Henry Immanuel v. Wyoming Concrete Industries, Inc.

Case No.: 95-WPC-0003

Title of Document: Recommended Decision and Order

I Sheila Joyce Neal, certify that on October 24, 1995 abovenamed document was mailed to the last known address of each of the following parties and their representatives.

*William J. DiMondi, Esq.
Wyoming Concrete Industries, Inc.
P.O. Box 206
Wyoming, DE 19934-0206

Henry Immanuel
2250 Elliott Island Road
Elliott, Maryland 21869

*Pepper, Hamilton & Scheetz
James J. Sullivan
Kathryn A. Kelly
P.O. Box 1709
1201 Market Street - Suite 1401
Wilmington, DE 19899-1709

* Parties served by Certified Mail

Neal

'S-h-ei-1a-joy6,6 Nea
Legal Technician

*Richard E. Condit, Esq. Mick G. Harrison, Esq. Greenlaw
P.O. Box 77463
Washington, D.C. 20013-7463